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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **AT SEATTLE**

11 MATTHEW LEWIS, dba U S FINISH,
12
13 Plaintiff,

14 v.

15 TULALIP HOUSING LIMITED
16 PARTNERSHIP #3, a Washington
17 limited partnership; RAYMOND JAMES
18 NATIVE AMERICAN HOUSING
19 OPPORTUNITIES FUND II, L.L.C., a
20 Delaware limited liability company;
21 MIKE ALVA and PATTI GOBIN,
22 husband and wife, and the marital
23 community comprised thereof; CHUCK
24 JAMES and JANE DOE JAMES,
25 husband and wife, and the marital
26 community comprised thereof,

Defendants.

NO. 2:11-CV-01596-RSM

PLAINTIFF'S MOTION TO
REMAND TO STATE COURT AND
FOR AN AWARD OF FEES AND
COSTS

NOTE ON MOTION CALENDAR:
OCTOBER 28, 2011

21
22 **I. RELIEF REQUESTED**

23 Plaintiff Matthew Lewis, d/b/a U S Finish ("Lewis"), moves the Court for an order
24 remanding this case to state court and awarding Lewis his fees and costs incurred as
25 a result of the removal from state court to this Court by defendant Raymond James
26 Native American Housing Opportunities Fund II, L.L.C. (the "Fund"). This case could

MOTION TO REMAND

- 1

2:11-CV-01596-RSM

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not have been brought in this Court originally, because there was not complete diversity among the parties when the lawsuit was filed. No voluntary act by Lewis rendered the case removable. Under long-standing precedent, this Court therefore lacks removal jurisdiction as a matter of law, which entitles Lewis to his reasonable fees and costs incurred as a result of the wrongful removal.

II. FACTS

Lewis filed this lawsuit in Snohomish County Superior Court on July 1, 2011.¹ The lawsuit names the following defendants: Mike Alva, Patti Gobin, Chuck James, and Jane Doe James (collectively the "Individual Defendants"); the Fund; and Tulalip Housing Limited Partnership #3 (the "Partnership").² Lewis is domiciled in Washington State.³ The Individual Defendants are domiciled on the Tulalip Reservation, which is located in Washington State.⁴ The Partnership is a Washington limited partnership with its principal place of business in Washington.⁵

The Partnership and Individual Defendants moved to dismiss Lewis' claims against them by motion filed on approximately August 24, 2011.⁶ The Fund did not join in that motion. Lewis opposed the motion and oral argument was heard by the Superior Court on August 31, 2011. At the hearing, the court granted the motion as to the Partnership and the Individual Defendants, but declined to simultaneously dismiss the Fund.⁷

¹ Docket No. 1 ("Notice of Removal") p.1, lines 22-25.

² Notice of Removal, p.1 line 26 – p.2 lines 1-3.

³ Notice of Removal, p.4 lines 17-19.

⁴ Notice of Removal, Exh. 8 p.25 line 3 – p. 26 line 1, Exh. 8 p.72 lines 22 – 25.

⁵ Notice of Removal, Exh. 1 p.2 lines 1 – 5.

⁶ Notice of Removal, p.2 line 24 – p.3 line 2.

⁷ Notice of Removal, p.3 lines 3 – 13.

On September 23, 2011, the Fund removed the lawsuit from state court to this Court. According to its Notice of Removal, the Fund bases its removal on its allegation that diversity jurisdiction exists (for the first time) as a result of the (involuntary) dismissal of the Partnership and Individual Defendants.⁸

III. STATEMENT OF ISSUES

1. Should this Court remand to state court, since diversity did not exist when this lawsuit was originally filed, and the involuntary dismissal of the Partnership and Individual Defendants was not a voluntary act by Lewis?

2. Should the Court award Lewis his fees and costs incurred as a result of the Fund's removal pursuant to 28 U.S.C. § 1447(c) since the Fund lacked an objectively reasonable basis on which to remove under decades-old Ninth Circuit precedent?

IV. EVIDENCE RELIED UPON

This motion is based on the pleadings and files herein including but not limited to the Fund's Notice of Removal.

V. ARGUMENT

A. The Case Should Be Remanded to State Court Because No Voluntary Act of the Plaintiff, Lewis, Created Diversity Jurisdiction.

Under long-standing Ninth Circuit precedent, when an event occurring after the filing of a complaint gives rise to federal jurisdiction, the ability of a defendant to remove is not automatic but is instead governed by the "voluntary/involuntary rule." *California ex rel. Lungren v. Keating*, 986 F.2d 346, 348 (9th Cir. 1993) (citing *Self v. General Motors*, 588 F.2d 655, 657-60 (9th Cir.1978)). "The rule provides that a suit which, at the time of filing, could not have been brought in federal court must remain

⁸ Notice of Removal p. 4 line 23 – p.5 line 3.

1 in state court unless a voluntary act of the plaintiff brings about a change that renders
2 the case removable.” *Id.*

3 This lawsuit could not have been brought in federal court as originally filed.
4 Diversity did not exist under 28 U.S.C. § 1332. Lewis is a Washington citizen. The
5 Individual Defendants are Washington citizens. See *Schantz v. White Lightning*, 502
6 F.2d 67, 70 (8th Cir. 1974) (holding that individual defendants domiciled on
7 reservation were citizens of the state in which the reservation is situated). The
8 Partnership is a Washington citizen, since its principal place of business is in
9 Washington, and since it was incorporated under Washington law. See *Kuntz v.*
10 *Lamar Corp.*, 385 F.3d 1177, 1183 (9th Cir. 2004) (holding that any type of entity
11 incorporated under state law is to be treated like a corporation for diversity purposes
12 – a citizen of its state of incorporation and of its principal place of business). Thus, at
13 the time of filing, complete diversity did not exist between the plaintiff and defendants
14 as required to support diversity jurisdiction under 28 U.S.C. § 1332.

15 Because this lawsuit could not have been brought originally in federal court, the
16 Fund must show that a voluntary act by Lewis rendered the case removable. Since
17 the Partnership and the Individual Defendants were dismissed only as a result of their
18 motion to dismiss, which Lewis opposed, the Fund cannot make the required
19 showing. *E.g. Graybill-Bundgard v. Standard Ins. Co.*, ___ F.Supp.2d ___, 2011 WL
20 2470891 (N.D.Cal. June 22, 2011) (holding that order sustaining demurrer was not a
21 voluntary act by plaintiff). The lawsuit should be remanded.

22 **B. Lewis Should Be Awarded His Reasonable Fees and Costs Incurred as a**
23 **Result of the Fund’s Objectively Baseless Removal.**

24 “An order remanding the case [to state court] may require payment of just costs
25 and any actual expenses, including attorney fees, incurred as a result of the
26 removal.” 28 U.S.C. § 1447(c). Absent unusual circumstances, attorney fees are to

1 be awarded "where the removing party lacked an objectively reasonable basis for
 2 removal." *Rosetto v. Oaktree Capital Mgmt., LLC*, 664 F.Supp.2d 1122
 3 (D.Haw. 2009) (citing *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 126 S.Ct. 704,
 4 711, 163 L.Ed.2d. 547 (2005)). This does not require a finding of bad faith; instead,
 5 an award of fees and costs is appropriate when the removal was "fairly supportable
 6 but wrong as a matter of law." *Id.*

7 Here, as described above, the voluntary-involuntary rule makes the Fund's
 8 removal wrong as a matter of law and therefore without an objectively reasonable
 9 basis. Moreover, the voluntary-involuntary rule by which the Fund's removal fails has
 10 been the law of the Ninth Circuit for decades. As described in *Self v. General Motors*
 11 *Corp.*, 588 F.2d 655 (9th Cir. 1978), which is itself more than 30 years old, the rule
 12 originated in the nineteenth century case of *Powers v. Chesapeake & O. Ry.* 169,
 13 162 U.S. 92, 18 S.Ct. 264, 42 L.Ed. 673 (1898) and was firmly established in the
 14 early twentieth century. 588 F.2d at 657-58 (collecting cases). The Fund's removal
 15 was wrong as a matter of law under decades-old, established precedent.

16 Lewis requests that the Court permit him to bring a separate motion without oral
 17 argument to establish the amount of his fees and costs incurred. This is proper
 18 because if the Court grants Lewis' motion to remand the underlying lawsuit, it will still
 19 retain jurisdiction over the award of fees and costs. *Gilding v. Carr*, 608 F.Supp.2d
 20 1147, 1156 (D.Ariz. 2009).

21 VI. CONCLUSION

22 This lawsuit should be remanded to state court. It could not have been brought
 23 in this Court originally, and no voluntary act of the plaintiff, Lewis, rendered the case
 24 removable. Under long-standing Ninth Circuit precedent, this Court lacks removal
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jurisdiction as a matter of law. Accordingly, Lewis should be awarded his reasonable fees and costs incurred as a result of the wrongful removal.

DATED this 12 day of October, 2011.

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MOTION TO REMAND
- 6

2:11-CV-01596-RSM

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am, and at all times herein mentioned have been, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-mentioned action, and competent to be a witness herein.

On the date given below, I caused this document (with proposed order attached) to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

Gregory J Miner gminer@batemanseidel.com, aguile@batemanseidel.com, bsixberry@batemanseidel.com

DATED this 13th day of October, 2011, at Seattle, Washington.


Karen L. Baril